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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 1161

VALLECITO WATER COMPANY,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent.

Brief in Opposition

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OPINIONS BELOW

The Memorandum Order of the California Supreme Court denying a Petition for a Writ of Review is set out in Appendix A to the instant petition, and the Interim Opinion of the Public Utilities Commission of the State of California (hereinafter called Commission) is set out in said petition as Appendix B thereof.

JURISDICTION

The petitioner (hereinafter called Vallecito) invokes the Court's jurisdiction under 28 USC § 1257(3), and states (p. 2) "The federal question sought to be presented here was raised at the first available instance before the Public

Utilities Commission Petition for Rehearing, at p. 2, ..." *This statement is false.* The petition for rehearing addressed to the Commission was attached to and intended as a part of the petition for a writ of review addressed to the Supreme Court of California.[1] A perusal of the petition for rehearing addressed to the Commission shows that *it contains not the slightest intimation of any violation* of any provision of any constitution, state or federal.

The California Public Utilities Code sets out the California law governing review of decisions of the Commission. Section 1731 of said code is in material part as follows:

> "After any order or decision has been made by the commission, any party to the action or proceeding, or any stockholder or bondholder or other party pecuniarily interested in the public utility affected, may apply for a rehearing in respect to any matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. No cause of action arising out of any order or decision of the commission shall accrue in any court to any corporation or person unless the corporation or person has filed application to the commission for a rehearing before the effective date of the order or decision . . . ."

§ 1732 of said code is as follows:

> "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. *No corporation or person shall in any court urge or*

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1. The Commission is not advised that either of these documents has been filed with this Court as a part of the transcript of the proceedings in the Court below as required by this Court's Rule 21(1). The Commission, therefore, pursuant to Rule 21(6), will file with its brief in opposition certified copies of these documents unless previously advised that they have been filed by the petitioner.

rely on any ground not so set forth in the application." (Emphasis added throughout)

§ 1756 of said code is in material part as follows:

"Within 30 days after the application for a rehearing is denied, or, if the application is granted, then within 30 days after the decision on rehearing, the applicant may apply to the Supreme Court of this State for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. . . ."

By failing to allege, in its petition for rehearing addressed to the Commission, any violation of any provision of the Constitution of the United States, Vallecito lost its right (if it had any), under California law, to claim any such violation before any court. This Court has held that required state procedures must be followed in raising a federal question. *In Re Lamkin,* (1957) 355 U.S. 59; *Ferguson v. Georgia,* (1961) 365 U.S. 570, 572. Stern & Gressman, "Supreme Court Practice" (3rd Ed.) p. 95. It has also held that when required by state practice, the federal question must be raised before the trial court, *Williams v. Georgia,* (1955) 349 U.S. 375, 382-383. For purposes of the instant petition the Commission was in a position analogous to that of a trial court, and was the tribunal that, under California law, must have been given an opportunity to consider any alleged violation of a provision of the Constitution of the United States as a condition precedent to review in any court.

It follows that no "title, right, privilege, or immunity [has been] specially set up or claimed under the Constitution . . . of . . . the United States", as required by 28 USC § 1257(3).

There is another and distinct reason that Vallecito has failed to specially set up or claim any title, right, privilege or immunity under the Constitution of the United States. Although as above demonstrated Vallecito had no right to allege (for the first time) in the California Supreme Court a violation of the Constitution of the United States, nevertheless, it attempted to do so, and it states on page 2 of the instant petition that it raised the federal question sought to be presented here "before the California Supreme Court (Petition for Writ of Review and Points and Authorities in Support Thereof, at pp. 25-29)".

An examination of pp. 25-29 of this document discloses that Vallecito did not anywhere specify what provision of the Constitution of the United States was alleged to have been violated. This Court has held that such failure precludes the granting of a writ of certiorari, *Bowe v. Scott,* (1914) 233 U.S. 658, 664-665; Stern & Gressman "Supreme Court Practice" (3rd Ed.) p. 92.

In view of what has been said, this Court's jurisdiction does not attach to the matter set out in the instant petition.

QUESTIONS PRESENTED

(1) Whether this Court has jurisdiction under 28 U.S.C. § 1257(3) to grant a petition for a writ of certiorari where the petitioner failed to set forth specifically in its application for rehearing addressed to a state regulatory agency, as a ground on which it considered the agency's decision to be unlawful, a violation of a provision of the Constitution of the United States, where applicable state law contains a prohibition that "No corporation or person shall in any court urge or rely on any ground not so set forth in the application."

(2) Whether this court has jurisdiction under 28 U.S.C. § 1257(3) to grant a petition for a writ of certiorari where, in its petition for a writ of review addressed to the Court below, the petitioner failed to specify what provision of the Constitution of the United States was alleged to have been violated.

(3) Whether a corporation has standing in this Court to seek redress of a wrong alleged to have been inflicted upon an alleged stockholder of that corporation who has himself not sought any such redress in any of the proceedings below.

(4) Whether a state regulatory agency has denied due process of law to one who was specifically designated by name as a respondent in an investigatory proceeding commenced by the agency on its own motion; to whom notice of hearing in such investigation was given by the agency; who in fact was present at said hearing and, after contesting the agency's jurisdiction over him, testified as a witness; who was thereafter erroneously and inexplicably told by the agency's hearing officer that he was not a respondent, and told by the agency's staff counsel that he had been subpoenaed to appear only as a witness, and that the staff did not intend that the agency exercise any jurisdiction over him; who subsequently appeared by his own counsel; where such counsel stated on the record that his client had decided, upon advice of counsel, not to participate in said proceeding; where thereafter he offered no evidence or argument, and examined no witness, but his counsel was present at nearly all subsequent hearings before the agency; where, after submission of the case, the agency, empowered by state law to regulate public utilities, ordered a public utility water company to reverse its stock transfer records and cancel a transfer of a controlling interest in its capital stock to him where applicable state law provides that "No public utility shall purchase or acquire, take or hold, any

part of the capital stock of any other public utility, organized or existing under or by virtue of the laws of this state, without having been first authorized to do so by the Commission. Every assignment, transfer . . . of any stock by or through any person or corporation to any corporation or otherwise in violation of any of the provisions of this article is void and of no effect, and no such transfer shall be made on the books of any public utility"; where the agency had not authorized such a transfer; where there was evidence adduced before the agency that he participated in a scheme intended to circumvent a prior decision of the agency denying to a second public utility authority to acquire control of the first, and further evidence and a finding by the agency that he did not acquire such stock in good faith.

(5) Whether the matter described in the petition is of sufficient gravity to warrant the granting of a writ of certiorari by this Court.

STATUTES INVOLVED

In addition to those statutes set out hereinabove in whole or in part on pages 2 and 3 under the heading "Jurisdiction", the statutes involved are those set out on pages 3, 4 of the petition.

STATEMENT OF THE CASE

The "Statement" of Vallecito is erroneous and misleading in numerous respects to be hereinafter described.

The controversy involved herein arose in 1962 out of the rivalry of two public utility water companies for control of a third, Vallecito. The Commission authorized one of these rivals to acquire all of Vallecito's capital stock. Before this authority was exercised the other rival, Suburban Water Systems, (hereinafter Suburban), caused its wholly owned subsidiary Calfin, found by the Commission to be

Suburban's *alter ego*, to purchase a controlling interest in Vallecito's stock, and sought for itself authority from the Commission to acquire all of Vallecito's assets. The Commission denied such authority to Suburban and contemporaneously found that the stock purchase by Calfin was tantamount to a purchase by Suburban, and that such purchase, not having been authorized by the Commission, was void under § 852 of the Public Utilities Code of California.

Thereafter, Suburban requested authority from the Commission to purchase the shares held by its *alter ego* Calfin. The Commission denied said request and enjoined any further transfer of said stock. But six days before the Commission's order was issued, the president of Suburban, who was the owner or controller of a large interest in its stock, one Camille Garnier, arranged, through his credit and numerous persons acting in concert with him, a further transfer of the stock held by Calfin to one William J. Hickey, an experienced lawyer and a friend of a friend of Garnier. The purpose of this transfer was to circumvent the Commission's prior decision denying authority to Suburban to acquire Vallecito's assets, and to anticipate and frustrate the Commission's decision denying to Suburban authority to purchase, and enjoining the further transfer of, the shares held by its subsidiary Calfin. The transfer of this controlling interest in Vallecito shares to Hickey's friendly hands enabled Garnier, as he intended, to continue his (and Suburban's) control of Vallecito. Garnier had already become president and a director of Vallecito, and with two other directors who were also directors of Suburban, constituted a majority of Vallecito's board of directors.

Virtually every detail of the elaborate scheme by which this transfer was accomplished, and by which Hickey acquired color of title to the shares in question, was laid bare before the Commission in the investigatory proceeding it commenced for the purpose, among other things, of inquir-

ing into the transfer of those shares to Hickey. It does not appear necessary or desirable to set out here a complete description of that scheme and how it was carried out. Such a comprehensive narrative, however, was set out by the Commission before the California Supreme Court, with complete documentation by references to the record adduced before the Commission.

It seems sufficient here to say merely that there was abundant evidence before the Commission that *Hickey invested not one cent* in the shares in question; that the purported purchase by him was colorable only and was made possible by money borrowed from a bank on Garnier's credit; and that either Hickey was actually privy to Garnier's scheme or, as a lawyer, he had ample grounds for suspecting the bad faith of the parties who arranged the numerous and devious transactions involved in the transfer.

Upon this and additional substantial evidence the Commission found that Hickey was not a bona fide purchaser.

A copy of the Commission's order instituting investigation into this transfer is Appendix C to the instant petition. It appears from this order, as acknowledged in the petition (p. 7), that Hickey was specifically named as a party respondent therein. Despite this basic fact the petition states (pp. 7, 8) that "the Commission chose not to adhere to the initial decision to designate Mr. Hickey and the others as parties respondent." In support of this wholly erroneous statement Vallecito refers to certain statements not by the Commission, but by its hearing examiner and staff counsel, that Hickey was not a party to the proceeding. It is true that the transcript of the record before the Commission reflects some misunderstanding as between counsel and the Commission's hearing examiner as to whether Hickey was a party before the Commission, or merely a witness, and as to the extent of the Commission's jurisdiction over him.

And the Commission's hearing examiner plainly and inexplicably erred in stating that "The Commission did not make [Hickey] a respondent." This misunderstanding apparently arose out of the fact that counsel for the Commission staff in preparing for hearing did not assume that Hickey would be present merely because he had been named a respondent, but caused to be issued and served upon him a subpoena duces tecum requiring his attendance as a witness. In any event, whatever misunderstanding arose did not injure Hickey. Neither staff counsel nor the Commission's hearing examiner ever said, either in so many words or in substance, as stated on page 8 of the instant petition, that "The caption on the order instituting investigation designating him as [respondent] was in error and should be disregarded".

It is obvious that the Commission designated Hickey a respondent in order to afford him an opportunity to be heard. The Commission never withdrew or in any way modified that designation.

Hickey was given notice of the hearing before the Commission and Vallecito admits that he appeared before the Commission [footnote p. 7], but states that his appearance was "in compliance with the Commission's subpoena". This statement is highly misleading. The transcript of the record before the Commission shows that when he first appeared before the Commission Hickey, after identifying himself, said "I am here in two capacities, one as a witness * * * The second matter, I would like the record to show that I have been served as a respondent in this matter * * * I . . . feel that the Commission has no jurisdiction to name me in this action as a respondent and, therefore, appear specially to contest the jurisdiction in that regard. As a witness, I intend to cooperate with the Commission to the best of my ability." (Tr. pp. 48, 49).

The transcript also shows that Hickey took the witness stand and testified up to a point with respect to the circumstances surrounding his acquisition of the Vallecito shares; that he was then asked whether it was "from your own personal funds that you purchased this block of shares?"; that he declined to answer on the grounds that "the source and condition of my private funds and resources I think are a matter that are strictly confidential to me and within my own private knowledge where they should stay."; that Hickey requested that he be excused until he could obtain counsel; that his request was granted; that when the hearing was resumed at a later date Hickey was not personally present but appeared by his attorney who stated on the record that he had advised Hickey that the Commission's investigation was illegal on various grounds, and that the subpena duces tecum was illegal and invalid, and that *Hickey had "decided not to appear before the Commission"* (Tr. pp. 239-264, 283, 289).

Contemporaneously with this decision Hickey brought an action in another forum, the Superior Court, a court of general jurisdiction, seeking a judgment quieting his title to the shares in question. After protracted litigation, that action was stayed by the Superior Court pending a final disposition of the Commission's investigation proceeding.

Hickey was later cited by the Commission for contempt for his refusal to complete his testimony before the Commission.

Another error appears in the petitions' Statement on page 4 where it is said of the Commission's order that it required Vallecito "to cancel 18,003 of its shares held by one William J. Hickey . . . ." The same error is repeated on pages 6, 11, 12 and 14 of the petition.

A reading of paragraph 6 of the Order (Petition Appendix p. 21) shows that the Order directed Vallecito to "re-

verse its stock transfer records and cancel the transfer to William J. Hickey. . . ." Obviously, Vallecito was ordered to cancel, not the stock, but the transfer of it.

ARGUMENT

A. The Court Has No Jurisdiction.

This conclusion has been demonstrated hereinabove on pages 1-4 under the heading "Jurisdiction".

B. The Petitioner Has No Standing.

With one qualification it can be said that the entire thrust of Vallecito's case is the charge that someone else, Hickey, has been denied due process of law.

The one qualification is the assertion, cautiously put and without conviction (p. 14), that "compliance by petitioner with [the Commission's] order *may* subject it to civil liability."

This qualification can be quickly dismissed with the observations that the Constitution of the United States offers no immunity from civil suits for damages; and that no question involving any such risk appears on page 2 of the petition as a "Question Presented."

In every other respect the petition is an argument on behalf of Hickey, and Vallecito strains mightily to find standing for itself to plead his cause.

The explanation for this extraordinary spectacle lies in the following: Hickey and his counsel deliberately decided to seek, in another forum, a judgment quieting Hickey's title before the Commission could reach a decision; and they apparently concluded that, as a part of this plan, Hickey should contest the Commission's jurisdiction, absent himself from its hearings, and refrain from seeking any relief from it, in order to avoid the appearance of having

submitted to the Commission's jurisdiction. This plan required, when the Commission's decision was rendered, that Hickey refrain from seeking rehearing. And that proved to be a mistake from Hickey's point of view because thereby, pursuant to Sections 1731 and 1732 of the California Public Utilities Code, he lost his right to seek review of the Commission's decision by the California Supreme Court, and by this Court. It is Garnier and not Hickey who has a large sum of money at stake; and Garnier controls Vallecito.

Now Vallecito says (petition p. 14) that it "probably" has "standing by necessity" to seek review here; that "as a technical matter, there may be no other means by which the rights of Mr. Hickey can be adjudicated. He was not a party to the proceedings before the Commission and apparently could not have sought review of the Commission's order in the California Supreme Court (or thereafter in this Court)."

In other places in the petition Vallecito repeats the assertion that Hickey was not a party to the proceedings before the Commission; that he "had no reason or opportunity to exercise the rights of a party to introduce evidence and examine witnesses"; that if he was at first a party the Commission did an "about-face", and "chose not to adhere to the initial decision to designate Mr. Hickey" a respondent; and that "no hearing of any kind was afforded Mr. Hickey" (pp. 8, 11, 13, 18). It is even suggested that the Commission was guilty of "luring" Hickey into a waiver of his Constitutional right (p. 19).

The error of these statements has already been demonstrated hereinabove on pp. 8-10. The truth is that the Commission made Hickey a party, whether he wished to be or not, and never thereafter changed his status. Vallecito pretends that Hickey was beguiled by members of the

Commission staff into giving up his opportunity to be heard. The truth is that he deliberately and knowingly, and on advice of counsel, deprived himself of such opportunity. Naturally, the Commission made no effort to force Hickey to put on a case, although it did insist upon his testifying as a witness called by its staff counsel.

Even if it should be assumed, *arguendo,* that Hickey was not a party to the Commission's proceeding, or that he was once made a party but his status was changed by the Commission, nevertheless, there was another way in which he could have argued he was eligible to seek review of the Commission's decision. He has always maintained he is a stockholder in Vallecito, and under Section 1731 of the Public Utilities Code of California (above set out on p. 2), he could have urged that he had a right as such to apply to the Commission for rehearing of its decision, and thereby to qualify for review by the California Supreme Court, and by this Court.

The petition is seriously in error therefore in stating (p. 14) that Hickey "could not have sought review of the Commission's order in the California Supreme Court."

There is, therefore, no basis whatever for Vallecito's claim of standing to seek redress in this Court on behalf of one who deliberately disqualified himself. The case of *Barrows v. Jackson,* 346 U.S. 249, cited in the petition (p. 15) does not support any such claim. On the contrary the Court (at pp. 255-257) there referred to its rule that "ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others"; and continued: "... a person cannot challenge the constitutionality of a statute unless he shows that he himself is injured by its operation * * * This is a salutary rule, the validity of which we reaffirm."

C. The Commission Did Not Deny Hickey Due Process of Law.

It is clear from the Statement of the Case above set out on pages 8-10 that the Commission gave Hickey notice of its hearing and an opportunity to be heard, and that he did not choose to avail himself of it. There was no denial of due process under such circumstances.

In order to persuade the Court to grant certiorari Vallecito, on pp. 15-18 of the petition, has conjured up a conflict in cases having no relevance to the petition, cases involving the question of the need to give notice and an opportunity to be heard where none had been given. They are wide of the mark in the instant case where such notice and opportunity were given.

It seems unlikely that the Court will wish to heed, in the instant proceeding, Vallecito's adjurations that the alleged conflict in those cases be resolved.

D. The Alleged Wrong Described in the Petition Is Not of Such a Nature as to Warrant the Granting of Certiorari.

Even if one could assume, *arguendo,* that this Court has jurisdiction, that Vallecito has standing to plead another's cause, and that a Constitutional right has been violated, the matter is not of sufficient gravity to warrant this Court's review. It involves only a property right of a single person (whether that person be considered as Hickey or Garnier); the challenged decision turned on a unique set of circumstances and will affect no one else; no question of broad national or public import is presented; and there is no conflict in any relevant court decisions. The California Supreme Court did not even deem it necessary to require the Commission to certify and bring up the record of its proceeding, and denied the petition for a writ of review without opinion.

But the assumptions referred to are not reasonable; and the conclusion is inescapable that Hickey was not by the Commission denied an opportunity to be heard, but was a victim of his own (or Garnier's) decision not to participate in the Commission's proceeding.

CONCLUSION

Since this Court has no jurisdiction in the premises for the reason that Vallecito failed to qualify, under state law, for review by this Court, and failed to specify, for the California Supreme Court, the particular provision of the Constitution of the United States alleged to have been violated; and because Vallecito has no standing; and because Hickey was not denied an opportunity to be heard before the Commission, it is requested that the petition be denied.

Respectfully submitted,

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Dated: March 4, 1968.